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In the

Supreme Court of the United States

October Term, 1957

No. .....

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA,
Petitioners

v.

CLARISSA S. THOMPSON, ET AL.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools of the County of Arlington, Virginia, respectfully pray that a writ of *certiorari* be issued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the Fourth Circuit hereinafter set forth and represent as follows:

I.

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals was rendered on

February 12, 1958, and is printed as Appendix I to this petition. It has not yet been reported.

The "Findings of Fact and Conclusions of Law" of the District Court for the Eastern District of Virginia, Alexandria Division was rendered on September 14, 1957, and is printed as Appendix II. It is not reported.

II.

STATEMENT OF JURISDICTION

The final decree of the district court was entered on September 14, 1957, a copy of which is found as Appendix III.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (June 25, 1948, C. 646, 62 Stat. 928).

III.

THE QUESTIONS PRESENTED

Point 1

Does a federal district court have jurisdiction to enter a decree of injunction which has the effect of enjoining the enforcement of a state statute without first convening a three-judge court?

Point 2

Do the Federal Rules of Civil Procedure permit a continued prosecution of a "class-action" suit for the sole purpose of enforcing alleged claims of individuals when there is no common question of fact, and when no common relief is sought?

Point 3

May a federal district court exercise the function of a local school board before such local school board has been given an opportunity to exercise its judgment in making pupil assignments?

Point 4

Is the decision of the court below in conflict with the decision of the Supreme Court of Appeals of Virginia in the case of *DeFebio* v. *County School Board of Fairfax County*, a copy of which is printed as Appendix V of this petition?

IV.

THE STATUTE INVOLVED

Chapter 70 of the Acts of the General Assembly of Virginia, Extra Session, 1956, is generally referred to as the Virginia Pupil Placement Act. Local school boards and division superintendents of schools are divested of all authority to assign pupils to the public schools, such authority being vested in a Pupil Placement Board appointed by the Governor.

In accordance with Rule 23(d) of this Court, the Act is printed as Appendix IV to this petition and also may be found as Sections 22-232.1 to 22-232.16, inclusive, of the Code of Virginia, 1956, Additional Supplement, pp. 61-64.

V.

STATEMENT OF THE CASE

By order dated July 31, 1956, the district court enjoined the petitioners from refusing on account of race or color

to admit any child to a school under their control. That order was affirmed by the circuit court and certiorari was denied by this Court. 240 F. (2d) 59 (1956); cert. den. 353 U. S. 911 (1957). The jurisdiction of the district court was invoked under Title 28, U. S. Code, Section 1343.

In July, 1957, three of the respondents in this case filed a Motion to modify the aforesaid order for the purpose of making the injunction effective at the commencement of the school session in September, 1957, and for the further purpose of having the district court declare that they did not have to comply with the Virginia Pupil Placement Act. The district court refused at that time to pass judgment on the Act. (See Appendix I, II and III of "Brief and Appendix on Behalf of Appellants" which is made a part of the record in this case under Rule 21 of this Court.)

Thereafter, on September 9, 1957, three of the respondents filed their Motion for Further Relief asking for a decree directing the petitioners to admit them to the schools in which they allegedly had sought admission. On the same date, four Negro children filed a Motion to Intervene and their Complaint in Intervention, seeking the same relief as prayed for in the Motion for Further Relief. Without notice to the petitioners, orders were entered the same day granting the intervention and setting September 11, 1957, as the date to hear the Motion for Further Relief on its merits. (See Appendix V, VI, VII and VIII of "Brief and Appendix on Behalf of Appellants".)

On the said September 11th, the petitioners filed the following motions:

1. Motion to Continue Hearing on Plaintiffs' Motion for Further Relief.

2. Motion to Vacate Order on Motion to Intervene.
3. Motion to Dissolve the Injunction.
4. Motion to Dismiss the Motion for Further Relief.

After oral argument, the district court denied the first three motion set forth above but did not, and as yet has not, passed on the Motion to Dismiss the Motion for Further Relief. Instead, the court immediately proceeded to hear evidence on the Motion for Further Relief.

On September 14, 1957, the district court entered its decree directing that the seven respondents be admitted to the schools of their choice. The circuit court affirmed the decree by its *per curiam* opinion of February 12, 1958.

Of the seven respondents involved, three were attempting to enter the Arlington public school system for the first time when their parents presented them for enrollment on the opening day of school in September, 1957. They refused to sign and file pupil placement forms with either the local school authorities or the Pupil Placement Board which had a branch office in Arlington County.

The remaining respondents not only refused to sign and file pupil placement forms with the proper authorities, but also refused to make application for transfers out of the schools to which they had been previously assigned.

The only reason given by the respondents for desiring to enter a particular school was that it was the nearest school to their homes. No mention of race was made at any time and no reason other than failure to sign a pupil placement form was given by the school officials for refusing to admit the respondents to the schools of their choice.

VI.

THE REASONS FOR THE ALLOWANCE OF THE WRIT

The petitioners respectfully submit:

1. A serious jurisdictional question is raised in this case. As pointed out, the Virginia Pupil Placement Act divested the petitioners "of all authority now or at any future time to determine the school to which any child shall be admitted". (Section 1, Chapter 70, Acts of the General Assembly of Virginia, Extra Session, 1956; Section 22-232.1 of the Code of Virginia, 1956, Additional Supplement.) Yet the district court enjoined the petitioners from refusing to admit the respondents to the schools "to which they have made application for admission * * *." By so doing, the district court has effectively enjoined the operation of a State statute in violation of the provisions of Title 28, Section 2281, U. S. Code. Since the question of whether or not a district court of three judges should have been convened is jurisdictional, it may be raised for the first time in this Court. See *Rorick* v. *Everglades Drainage District*, 307 U. S. 208 (1939).

2. The court below sanctioned the departure from accepted and usual courses of judicial proceedings by the district court to such an extent as to call for an exercise of this Court's power of supervision in that a "class-action" suit was permitted to be used to enforce individual claims of the seven respondents. In the absence of a common question of fact, and when no common relief is sought, class actions are not permitted. Rule 23 of the Federal Rules of Civil Procedure.

3. The circuit court, by affirming the decree of the district court, has decided an important question of federal law

which has not been but should be settled by this Court. The question arises as a result of this Court's decisions in the school segregation cases (347 U. S. 483 (1954) and 349 U. S. 294 (1955)). It is whether a federal court should exercise the functions of a local school board.

4. An important question of local law has been decided by the courts below in such a way as to be in conflict with the case of *DeFebio* v. *County School Board*, 199 Va. 511 (1957); Advance Sheets No. 5 at p. 511. There, the Supreme Court of Appeals of Virginia held that the General Assembly had the power to vest in an authority, other than a local school board, the control over the placement of pupils in the public schools of the State.

VII.

ARGUMENT IN SUPPORT OF THE WRIT

Point 1

The Necessity for a Three-Judge Court

A district court of a single judge has no jurisdiction to hear and determine an application for an injunction which seeks to restrain a State officer from enforcing a State statute upon the ground that such statute is unconstitutional. 28 U. S. C. Section 2281. Further, the necessity for a three-judge court, being jurisdictional, may be raised for the first time in this Court. *Rorick* v. *Everglade Drainage District*, *supra*, at p. 209.

There can be no doubt that the Virginia Pupil Placement Act is a state law of state-wide concern and of general application. Compare *Ex Parte Collins*, 277 U. S. 565 (1928). It is equally clear that the members of the school board and

the division superintendents of schools, or their successors in office, the members of the Pupil Placement Board, are such state officers as contemplated by the language of Section 2281. See *Cleveland* v. *United States*, 323 U. S. 329, 332 (1945).

This Court recognized, in the case of *Doud* v. *Hodge*, 350 U. S. 485, 487 (1956), that when a complaint attacks the validity of a State statute under the Fourteenth Amendment, the suit should be tried before a district court of three judges. See also *Phillips* v. *United States*, 312 U. S. 246, 253, wherein the following test was laid down by this Court in discussing the necessity for a three-judge court:

> "* * * In other words, the complaint must seek to forestall the demands of some general state policy, the validity of which be challenges. * * *"

The respondents' Motion for Further Relief and Complaint in Intervention meet the rule enunciated in the above cited cases. Paragraph 2 of the said Motion and paragraph 5 of the said Complaint are identical except for the difference in reference to the movants in the two pleadings. Paragraph 2 reads as follows:

> "2. The Pupil Placement Act is an integral part of a legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act

> denies infant plaintiffs their liberty without the due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that plaintiffs are legally required to exhaust as a condition precedent to seeking relief in this Court." (Brief and Appendix on Behalf of Appellants, App. 5 and 9.)

Thus, it can be seen that the respondents did attack the constitutionality of a State statute under the Fourteenth Amendment.

Two other questions must now be considered. First, does the injunction issued by the district court restrain the "enforcement, operation or execution" of the Virginia Pupil Placement Act? It clearly does. In the case of *DeFebio* v. *County School Board*, *supra*, at p. 513, the Supreme Court of Appeals of Virginia construed the Act to require, as a prerequisite to admission to the public schools, that an applicant furnish the following information to the Pupil Placement Board:

> "(1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled."

The order of the district court requires the petitioners and the Pupil Placement Board to admit the respondents to the public schools of their choice without first compelling them to comply with the requirements of the Virginia Pupil Placement Act set forth in the preceding paragraph. This unequivocably restrains the "enforcement, operation or execution" of the Act.

Finally, may it be argued that a three-judge court is not necessary by reason of the fact that the decree of the district court does not enjoin the petitioners, or their successors in office, from enforcing the Virginia Pupil Placement Act? We submit that it cannot be so argued.

When the district court's "Findings of Fact and Conclusions of Law" are read, with particular reference to paragraph II thereof, the effect of its decree becomes apparent. (See Brief and Appendix on Behalf of Appellants, App. 20.) The petitioners and their successors in office have been enjoined from enforcing a State statute.

It is interesting to compare the case of *School Board of City of Newport News, Va.* v. *Atkins*, 246 F. (2d) 325 (4th Cir., 1957), cert. den. ..... U. S. ....., 78 S. Ct. 83, 2 L. Ed. (2d) 80 (Oct. 1957). There the decree of the district court did not require the assignments of children to particular schools. The operative language only restrained the local school officials from "refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in, such school."

Commenting on the necessity for a three-judge court, the circuit court said, at p. 327:

> "It is argued that the court was without jurisdiction of the cases and that only a three-judge court would have had jurisdiction because the constitutional validity of the Pupil Placement Act was involved. This question was not raised, however, in the applications for injunction, which were filed before the passage of that act and which merely sought the protection of constitutional rights in a suit for the hearing of which a court of three judges was not required. * * * As no injunction was asked or granted against the enforcement of

the act or the officials charged with its enforcement, a case for the constitution of a three-judge court was not presented, even though the constitutionality of an act relied on in the motion to dismiss was involved."

The facts of this case, as heretofore set forth, plainly distinguish it from the above quoted case. Here, the respondents attacked the Virginia Pupil Placement Act on the ground that it denied them liberty without due process and the equal protection of the laws secured by the Fourteenth Amendment. The result of the district court's decree is indistinguishable from a decree that might in more specific language prevent the enforcement or the execution of the Act. To hold otherwise would defeat the purpose and intent of Section 2281.

A three-judge court is required when a petition seeks an injunction on the ground of the unconstitutionality of a statute as applied. *Ex Parte Bransford,* 310 U. S. 354 (1940). Therefore, this Court should exercise its power of supervision by granting this writ and holding that the court below was without jurisdiction to affirm the decree of the district court.

Point 2

A Class Action May Not Be Brought to Enforce the Rights of These Respondents

The applicable language of Rule 23 of the Federal Rules of Civil Procedure pertaining to class actions reads as follows:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all

may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * *

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Petitioners recognize that this Court has approved the principle that when violations of individual rights are committed on a class basis or as a group policy, such as discrimination generally because of race, such rights are entitled to be the subject of class actions and class adjudications under Rule 23. The respondents had a class adjudication of their rights as evidenced by the district court's order of July 31, 1956. See 240 F. (2d) 59 (1956). Here, they seek personal rights, the exercise of which must necessarily depend upon the facts peculiar to each individual. Under such circumstances, a class suit is not permitted.

Although designated "Plaintiffs' Motion for Further Relief," the pleading was in reality an original complaint by each of the seven colored children (four of whom were strangers prior to September 9 to any litigation affecting their rights to attend school) alleging that they, as particular individuals, had been denied admission to the public schools of Arlington in violation of the Fourteenth Amendment. The fact that the respondents sought to use the original class action as a vehicle is no reason to deny the petitioners due process of procedural law, as embodied in the Federal Rules of Civil Procedure, namely, to have the sufficiency of the complaint tested by a motion to dismiss (Rule 12(b)(6)), to be thereafter allowed ten days to answer the motion and raise issues of fact (Rule 12(a)), and to then try the issues of fact after reasonable time for preparation. On the

contrary, these seven respondents filed their complaint and the trial was concluded thereon in less than three days without any answer thereto having been filed. The Federal Rules of Civil Procedure make no distinction as to the color or race of the litigants. Yet that very effect was obtained in this instance: a so-called class action was brought wherein all Negro school children in Arlington County, present and future (even persons yet unborn) may bring their complaints without twenty days' notice to the petitioners, without having the legal sufficiency of the complaint tested before a trial on the facts, and without having their cases placed on the docket for trial in due course.

This novel and discriminatory result has been achieved by prosecution of a "class-action" suit. It is submitted that no such result was contemplated by Rule 23. The Rule contemplates that where a class is numerous, one or more persons may, on behalf of all, sue "when the character of the right to be enforced for or against the class is * * * (3) several, and there is a common question of law or fact affecting the several rights *and a common relief is sought.*" (Italics supplied.) The respondents recognized and alleged this in their original complaint as justification of the class action. An injunction was obtained for the benefit of the class and this has become final. But now there is no basis for a class action in enforcing the claims of the *individual* or several members of the class because there is no common question of fact relating to all members of the class, or even to the seven individual respondents involved in this appeal; and no common relief is sought. While the question of fact in the case of each of the seven children is: "Was he denied admission because of race or color," there must be an individual determination as to each one. Assume there had been discrimination as to one but not as to the others: this would

not justify the requiring of all seven to be admitted to the schools of their choice; and conversely, the denial of relief as to the six would not justify denial of relief to the seventh. Thus no "common relief" is sought as is required by Rule 23.

The very fact that four of the respondents found it necessary to intervene demonstrates that common relief is not sought. The concept of a class action is that one or a few obtain a judicial determination for the benefit of all in the class.

The individual nature of the specific complaints of the respondents was noted by the District Court in the memorandum accompanying the order of July 27, 1957, when it was said:

> "If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and percision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand." (Brief and Appendix on Behalf of Appellants, App. 3.)

The individual complaints here involved are foreign to the principle of a class action. Being complaints of denial of constitutional rights, based on the peculiar facts relating to each individual respondent, such complaints should follow the procedure required in individual civil suits, and the petitioners are entitled to such procedure.

Point 3

A Federal Court Should Not Exercise the Functions of a Local School Board

The Arlington County school system, both elementary and high, is divided into school districts. Children are not assigned to the school nearest their residence, but are only assigned to the school in the district of their residence. In placing the colored children in schools nearest their residence the court order discriminates against white children who do not have such privilege. For instance, children living along the east side of Glebe Road at North 16th Street are only a block and a half from Woodlawn School but because they are in the Page School district they are required to go some thirteen or fourteen blocks to the Page School. Children living near the County line along North Montague Road are required to go some ten or twelve blocks to Stonewall Jackson School, when both Ashlawn and Glencarlyn Schools are much closer. Children living only a block and a half from Yorktown School are required to go three or four times that far and attend Jamestown School. Children facing on the south side of Lee Highway near Lexington Street have the Robert E. Lee School at their door, while those on the other side of the road are compelled to go seven or eight blocks to the Nottingham School.

The elements considered in laying out school districts were not fully developed in the evidence but certainly the boundaries are not to be broken down in order to place two or three children in their nearest schools.

The Motion and Complaint of the respondents did not allege that any of the seven children had been denied admission to the schools on account of race or color. And each of the witnesses admitted that race or color played no part

in the denial of admission—it was solely because the parents refused to make written application for admission as required by the Placement Board, except in one case where the assignment was made to a school other than one to which he presented himself, and the parent made no application to anyone for a transfer from the assigned school.

Further, it was not alleged to which schools the seven children applied, nor were any facts alleged which would entitle the particular children to be admitted to the particular schools applied to. At the trial it was brought out for the first time the various schools to which the seven children had applied; but the only reason given for applying to those schools was that was the nearest to their homes in each instance. It was never shown that a white child had ever had the right to be enrolled in the school nearest his home. Imagine the dislocation, the overcrowding of some schools and classes and the small attendance in others, if white children were granted the same privilege that has been granted these respondents—to attend the school nearest their home, with no other factors whatsoever being considered.

The placement of pupils is an administrative function, and should not be undertaken by a federal court unless and until it is clear that the proper school authorities either refuse to do so, or do so illegally. Being agents of the Commonwealth of Virginia, the petitioners are under a duty to comply with State laws until such laws are held invalid by a final judgment. When the judgment here appealed from was entered on September 14, 1957, there had been no such final judgment outlawing the Virginia Pupil Placement Act. Further than that, on July 27, 1957, the district court in this very case denied as premature a motion of the respondents which would have permitted them to by-pass the Placement Act (Brief and Appendix on Behalf of Appellants,

App. 3), by which action the Court impliedly, if not specifically, directed the petitioners to follow said Act until ordered otherwise. In obeying the Placement Act the petitioners kept hands off all matters relating to the assignment and enrollment of pupils for the September 1957 term. Any decision completely invalidating the Placement Act, should provide for an orderly transition in revesting the enrollment functions in the local authorities to permit the weighing of factors and problems not before the district court such as relative achievement levels, proper distribution of school population into school districts, transportation, efficient use of school buildings and personnel, and others. The interest of the public in having an orderly school system administered by school officials would seem to outweigh the interest of the seven respondents in getting in a desegregated school a few weeks sooner.

It is respectfully submitted that under the facts as outlined above the district court improperly exercised the functions of a local school board. Such action is not only of vast significance to the petitioners, but to all others who will feel the impact of this Court's decisions in the school segregation cases.

Point 4

The Decision of the Supreme Court of Appeals of Virginia in the DeFebio Case

It is contended that the prohibitions of an injunction cannot be avoided by the simple expedient of an undertaking to transfer the assignment power from the school board to the Pupil Placement Board. Petitioners do not disagree. It is also recognized that a successor in office may be bound by an injunction decree restraining a predecessor.

However, the district court is not correct in its conclu-

sion in this regard. Assuming, for sake of argument, that the Pupil Placement Board was a successor in office to the local school board and is bound by the restraining order previously entered by the district court, how can it also be said that the local school board, immediately or through their agents, denied admission to the respondents? If the petitioners have been succeeded in office as the district court states, they have no authority to admit, deny, enroll or not enroll pupils in the public schools of Arlington County.

Assuming that the Pupil Placement Board has knowledge of the injunction decree and it is otherwise binding on it, as stated by the district court, the local school authorities are no longer proper parties against which to proceed. If, in fact, the Pupil Placement Board has knowingly violated the order of the district court previously entered, appropriate remedies are available to the respondents.

In short, if the decision of the Supreme Court of Appeals of Virginia in the *DeFebio* case, *supra*, is to be recognized, the proceeding in the court below should be dismissed as to the petitioners.

Respectfully submitted,

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Dated April 2, 1958

CERTIFICATE OF SERVICE

I hereby certify that copies of the aforegoing petition have been served by mailing the same, with first class postage prepaid, to the following counsel of record:

Edwin C. Brown
1200 Cameron Street
Alexandria, Virginia

Spottswood W. Robinson, III
623 North Third Street
Richmond, Virginia

Oliver W. Hill
118 East Leigh Street
Richmond, Virginia

on this 2nd day of April, 1958.

.....

HENRY T. WICKHAM

APPENDIX I

Opinion of the United States Court of Appeals for the Fourth Circuit

Before PARKER, Chief Judge, SOBELOFF and HAYNSWORTH, Circuit Judges.

PER CURIAM:

This is another appeal in the school segregation case which was before us in *County School Board of Arlington County, Virginia, et al.* v. *Clarissa Thompson, et al.*, 4 Cir. 240 F. 2d 59, cert. den. 353 U. S. 910. After the affirmance of the decree on the former appeal, the District Judge found that seven Negro children had been denied admission to schools in violation of the terms of the decree and entered an order enjoining defendants from refusing to admit them to the schools to which they had applied for admission. We think that the order was clearly proper for reasons adequately stated in the opinion of the District Judge and nothing need be added to what was there said.

While ordinarily in cases of this sort an injunctive order should merely enjoin racial discrimination by school authorities without attempting to direct details of administration, there was a finding here that, in violation of the prior injunctive order of the court, discrimination had been practiced with respect to these Negro children. The judge found that the defendants in refusing them admission had acted in good faith in reliance upon a statute passed after the entry of the injunctive order and that they "did not intend any defiance of the injunction". Instead of adjudging them in contempt, therefore, and providing that the contempt might be purged by admitting the children to the schools to which they had made application, he took the milder

course of entering an order specifically defining what was required of defendants under the order which had been violated and giving them the opportunity of avoiding a contempt citation by complying with the order so entered. There is nothing in this of which they can justly complain.

Affirmed.

APPENDIX II

The Court's Findings of Fact and Conclusions of Law (Dated September 14, 1957)

Seven negro children of school age were refused admission as pupils in the public schools of Arlington County, Virginia on the opening day of the current session. The ground of the refusal was that the applicants had not complied with, or obeyed, the provisions of the Pupil Placement Act of Virginia, 1956 Acts, Extra Session, c.70. That statute requires every child before entering a public school for the first time, or on graduation from one school to another, to apply to the Pupil Placement Board for enrollment. In refusing the admission, the school principals were following the directions of the defendant County School Board and Superintendent who, in turn, were following the Act. These children, now called the plaintiffs, assert that the refusal violates the injunction previously entered by this court restraining the defendants from denying enrollment in any public school of the County, on account of race or color, to any otherwise qualified child. The plaintiffs move for a supplemental decree directing the admission of these children to the schools. The court will grant the motion.

I. In its injunctive decree the court took notice of existing and future State and local rules and administrative

remedies for the assignment of children to public schools. It directed conformance with them before the complainant should turn to the court. Of course, the decree only contemplated reasonable regulations and remedies. Defendants' position that the Pupil Placement Act is such a regulation or remedy is untenable. The procedure there prescribed is too sluggish and prolix to constitute a reasonable remedial process. On this point we also rely upon the reasoning of the Court of Appeals for this Circuit in School Board of the City of Newport News et al. v. Atkins et al., July 13, 1957.

It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal. For these reasons decision here need not await the outcome of the pending effort to obtain a review of the Court of Appeals' judgment.

This court had hoped that the initial step provided in the Placement Act might be isolated and utilized as a fair and practicable administrative remedy. It thought that a requirement that a pupil first entering a school, or transferring from one school to another, should seek placement from some official or board, would not only be a reasonable, but a necessary regulation as well, in the administration of the school. This agency, it seemed, might validly be a State agency exclusively—such as the Placement Board.

However, the court finds that it cannot fairly require the plaintiffs even to submit their applications to the Board for

school-assignment. The reason is that the form prescribed therefor commits the applicant to accept a school "which the Board deems most appropriate in accordance with the provisions" of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed "under protest", the petitioner would not have an unfettered and free tribunal to act on his request. The Board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there.

II. The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment powers of the Placement Board are not acceptable as regulations or remedies suspending direct obedience of the injunction. In law the defendants are charged with notice of these infirmities in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were imputable, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction.

III. We look, then, to see if race or color was the basis for the denial by the defendants and their agents of admission of the applicants to the named schools. It is immaterial that the defendants may not have intended to deny admission on account of race or color. The inquiry is purely objective. The result, not the intendment, of their acts is determinative.

In this inquiry we have no administrative decision with which to commence, save in one instance. Consequently, the court must examine the evidence in regard to each applicant and ascertain whether it indicates that the denial of admittance was there due solely to race or color. The court is not undertaking the task of assigning pupils to the schools. That is the function of the school authorities and the court has no inclination to assume that responsibility. Carson v. Warlick, 1956, 4 Cir., 238 F. 2d 724, 728. But it is the obligation of the court to determine whether the rejection of any of the plaintiffs was solely for his race or color. In this light only does the court now review the evidence.

IV. Arlington is a small county in size, but thickly populated and having the appearance of a city. It has 22,677 (about) pupils in its public schools. Of those 1432 are negroes—946 in the elementary schools, 311 in the junior high school (7th, 8th and 9th grades) and 175 in the senior high school (10th, 11th and 12th grades).

All together there are 40 school buildings in the County. These include 4 schools for negroes — one high school Hoffman-Boston (combining junior and senior) located in the extreme southern end of the County and embracing an elementary school with it; and 2 other elementary schools, Drew-Kemper near the Hoffman-Boston, and Langston in the district to be mentioned in a moment as the northern Hoffman-Boston.

There are 2 high schools for the white children, Wash-

ington and Lee in and to serve the northern half, and Wakefield in and for the south half, of Arlington; there are 6 junior high schools, Stratford and Swanson among them, scattered throughout the County for the white children; and there are 28 elementary "white" schools, including Fillmore and Patrick Henry.

Each school and its contiguous territory form a school district. The boundaries of a district are drawn to include the school population in the vicinity of the school as far as the facilities of the school will allow. Before the creation of the Placement Board the pupils assignable to each school were, if otherwise elegible, limited to those who resided in the school district. These lines have never been altered by the School Board, but the defendants point out that the Placement Board may or may not follow these bounds. Apparently it has done so.

Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a "white" school, but each lives in the district of that school or of another nearby "white" school. Nor did the evidence reveal a lack of space for him, or that the school did not afford the courses suited to the applicant. Counsel for the defendants explained that they did not adduce evidence as to the eligibility of the applicants for their respective schools because this was a matter within the purview of the Placement Board. Anyway, no intimation of disqualification appeared as to any applicant.

A review of the evidence is convincing that the only ground, aside from the provisions of the Placement Act, for the rejection of the plaintiffs was that they were of the negro race. The rejection was simply the adherence to the prior practice of segregation. No other hypothesis can be

sustained in any of the seven instances. The evidence as to the plaintiffs shows as follows:

(1) Rita and Harolyn Johnson, 15 and 16 years old, personally presented themselves for admission to the Washington and Lee High School on the opening day, September 5, 1957. They desired to enter the 10th and 12th grades, respectively, and carried with them documentary evidence of their academic proficiency, having attended schools in the District of Columbia during the last school session. Their residence is 2901 North Lexington Street, in the northern extremity of the County. It was within the Washington and Lee School District and a distance of approximately 2 miles (air line) from the school. The two other senior County high schools were twice that distance from the Johnson's.

They were refused admission because they had not executed the Board's placement forms. Their father declining to allow them to complete the forms, they are now attending school in the District of Columbia.

(2) Robert A. Eldridge, aged 9, wished to enter the 4th grade. As a new arrival in the County, his father had made application on August 15, 1957, for the enrollment of Robert in Fillmore, an elementary school. He procured a placement form but did not file it. On the opening of school Robert was refused admission into Fillmore for lack of the form.

This boy lives at First and Fillmore Streets, a distance of slightly more than one city block from the Fillmore School, but is within the School District of Patrick Henry, an elementary school six city blocks away. A white child living there would normally enter either Patrick Henry or Fillmore. The nearest school used by colored children was 1.25 miles away.

(3) Leslie Hamm had completed the elementary courses at the County's Langston School, and wanted to enter Stratford Junior High School. He was refused admission on the opening day of school at Stratford because he had not been assigned by the Placement Board, never having made application.

He resides at 1900 North Cameron Street. This address is within what we describe as the northern Hoffman-Boston District. This district, however, is 3.5 miles from the Hoffman-Boston School and from the area around that school also designated as a Hoffman-Boston District. The northern Hoffman-Boston District is set apart apparently because the area is occupied predominantly by negroes. However, a white child living in the northern District would be eligible to attend either the Swanson or Stratford Junior High School. Swanson is something more than a mile from the Hamm residence, Stratford slightly less than a mile.

(4) Louis George Turner and Melvin H. Turner, having respectively finished the 7th and 8th grades in one of the colored schools in the County, sought admission to the Swanson Junior High School on August 22, as well as on the opening day. Not having filled out the placement form, they were both refused admission. They live at the intersection of 22nd Street, North, and George Mason Drive. This is within the northern District of Hoffman-Boston. A white child in this section would ordinarily go either to Swanson or Williamsburg Junior High School. Swanson is less than a mile distant, while Williamsburg is about 1.25 miles away.

(5) George T. Nelson filled out a placement form and filed it on August 19 or 26 with the principal of Stratford Junior High School. On this application, the Pupil Placement Board assigned him to Hoffman-Boston School. On

the opening day of school he was refused admission at Stratford.

Nelson lives at 2005 North Cameron Street. This is within the northern Hoffman-Boston District. Hoffman-Boston School is 6 miles from his home, while Stratford is ½ mile away. Swanson Junior High School is a little further away. The basis for the Board's placement is not given; no reason is evident for ignoring Stratford or Swanson. It cannot be accepted, for it is utterly without evidence to support it.

V. The defendants and their agents, in barring the admission of the complainants, did not intend any defiance of the injunction. The bona fides of their assurance to the court—that they believed they should not admit the applicants without an assignment by the Placement Board—cannot be doubted. However, the defendants and their agents must now understand that the injunction is paramount in the present circumstances and that they can no longer refuse admittance to the plaintiffs.

The injunction will affect the school attendance very slightly. Into a white school-population of 21,245, only 7 negro children will enter; 1 negro will be with 11,421 white children in the elementary grades; and no more than 6 negroes among the 9,824 white high school students. Of 36 previously "all-white" schools in the County, 4 will be affected by the decree, and then not to a greater extent than 2 negroes in any one of the 4 schools.

The supplemental decree will be effective at the opening of the schools Monday morning, September 23, 1957.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

APPENDIX III

The Court's Supplemental Decree of Injunction
(Entered September 14, 1957)

Upon consideration of the motion by and on behalf of Harolyn Johnson, Rita Johnson, Robert A. Eldridge III, George Tyrone Nelson, E. Leslie Hamm, Jr., Louis George Turner and Melvin H. Turner that the court enter a further decree specifically directing the defendants to admit them to the schools to which they have applied for admission for the session of 1957-58, and upon consideration of the evidence and arguments of counsel for all the parties on said motion, the court is of the opinion, on the findings of fact and conclusions of law this day filed, that said motion should be granted, and, therefore, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing to admit the said movants to, or enroll and educate them in, the said schools to which they have made application for admission, that is:

1. Harolyn Johnson in the Washington and Lee High School;

2. Rita Johnson in the Washington and Lee High School;

3. Robert A. Eldridge III in the Fillmore School or the Patrick Henry School;

4. George Tyrone Nelson in the Stratford Junior High School or the Swanson Junior High School;

5. E. Leslie Hamm, Jr., in the Stratford Junior High School or the Swanson Junior High School;

6. Louis George Turner in the Swanson Junior High School; and

7. Melvin H. Turner in the Swanson Junior High School; upon the presentation by the said movants of themselves for admission, enrollment and education in the said schools commencing at the opening of said schools on the morning of September 23, 1957.

Let copies of this order be forthwith sent to counsel in this cause.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

APPENDIX IV

Chapter 70

Acts of the General Assembly of Virginia
Extra Session, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. All power of enrollment or placement of pupils in and determination of school attendance districts for the public schools in Virginia is hereby vested in a Pupil Placement Board as hereinafter provided for. The local school boards and division superintendents are hereby divested of all authority now or at any future time to determine the school to which any child shall be admitted. The Pupil Placement Board is hereby empowered to adopt rules and regulations for such enrollment of pupils as are not inconsistent with the provisions hereinafter set forth. Such rules and regulations shall not be subject to Chapter 1.1 of Title 9

of the Code of Virginia, the short title of which is "General Administrative Agencies Act". The Pupil Placement Board and any of its agents hereinafter provided for shall have authority to administer oaths to those who appear before said Board or any of its agents in connection with the administration of this act.

§ 1a. There is hereby created a board to be known as the Pupil Placement Board which shall consist of three residents of the State appointed by the Governor to serve for terms to expire at the expiration of the term of the Governor making the appointment. Members of the Board shall receive as compensation for their services a per diem of twenty dollars for each day actually spent in the performance of their duties and shall be entitled to reimbursement for their necessary expenses incurred in connection therewith.

§ 2. The Pupil Placement Board may designate, appoint and employ such agents as it may deem desirable and necessary in the administration of this act. It may authorize such agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by said Board.

§ 2a. For the conduct of such hearings and to facilitate the performance of the duties imposed upon it and its agents under this act, the Pupil Placement Board is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

§ 3. The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:

(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school.

(2) The health of the child as compared to other children in the school.

(3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.

(4) Availability of facilities.

(5) The aptitude of the child.

(6) Availability of transportation.

(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils.

(8) Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

§ 4. After the effective date of this act, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled, for good cause shown, in a different school by the Pupil Placement Board.

§ 5. Any child who desires to enter a public school for the first time following the effective date of this act, and any

child who is graduated from one school to another within a school division or who transfers to a school division, or any child who desires to enter a public school after the opening of the session, shall apply to the Pupil Placement Board for enrollment in such form as it may prescribe, and shall be enrolled in such school as the Board deems proper under the provisions of this act. Such application shall be made on behalf of the child by his parent, guardian or other person having custody of the child.

§ 6. Both parents, if living, or the parent or guardian of a pupil in any school in which a child is enrolled by action of the Pupil Placement Board, if aggrieved by an action of the Board, may file with the Board a protest in writing within fifteen days after the placement of such pupil. Upon receipt of such protest the Board shall hold or cause to be held a hearing, within not more than thirty days, to consider the protest and at the hearing shall receive the testimony of witnesses and exhibits filed by such parents, guardians or other persons, and shall hear such other testimony and consider such other exhibits as the Board shall deem proper. The Board shall consider and decide each individual case separately on its merits. The Board shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the city or county wherein the aggrieved party or parties reside. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter and the time and place of the hearing. The Board shall, within not more than thirty days after the hearing, file in writing its decision, enrolling such pupil in the school originally designated or in such other school as it shall deem proper. The written decision of the Board shall set forth the findings upon which the decision is based. Any parent, guard-

ian or other person having custody of any child in the particular school in which a child is enrolled by action of the Board shall be deemed an interested party and shall have the right to intervene in such proceeding in furtherance of his interest.

§ 6a. Any party aggrieved by a decision of the Pupil Placement Board under this act, or any party defined as an interested party in §6 may obtain a review of such decision by filing an application in writing for a review thereof with the Governor within fifteen days after such decision. Such application shall be by a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Pupil Placement Board, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Pupil Placement Board and a transcript of the proceedings before the Pupil Placement Board, which shall be furnished to the petitioner by the Pupil Placement Board within ten days after request therefor upon payment of the costs of such transcript by the petitioner. Upon the filing of a petition for a review with the Governor, the Governor shall set the same for a hearing and within fifteen days after the petition has been filed with him, he shall file, in writing, his decision, enrolling such pupil in the school originally designated or in such other school as he shall deem proper. The written decision of the Governor shall set forth the findings upon which his decision is based.

§ 7. Any party aggrieved by a decision of the Governor under this act or any party defined as an interested party in §6 may obtain a review of such decision by filing in the clerk's office of the circuit court of the county or corporation court of the city in the jurisdiction of which such party

resides, within fifteen days after such decision, a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Governor, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Governor and a transcript of the proceedings before the Governor, which shall be furnished to the petitioner by the Governor within ten days after request therefor upon payment of the costs of such transcript by the petitioner.

§ 7a. Any interested party, as defined in §6 may, by petition, intervene for the purpose of making known and supporting his interest, in any proceeding for review of the Pupil Placement Board's decision instituted by an aggrieved party or by another interested party; and the court having jurisdiction of such review proceedings shall hear the evidence of as many interested parties, as defined in §6, in any such review proceeding, as in its discretion it may deem proper, whether or not such interested parties shall have petitioned for such review or petitioned to intervene.

§ 8. Upon the filing of the petition the clerk of the court shall forthwith notify the Pupil Placement Board, requiring it to answer the statements contained in the application within twenty-one days, but failure to do so shall not be taken as an admission of the truth of the facts and allegations set forth therein. The clerk of the court shall publish a notice of the filing of such application once a week for two successive weeks in a newspaper of general circulation in the county or city for which the court sits and shall, in addition, post the same at the door of the courthouse. The notice shall contain the name of the applicant and the pertinent facts concerning his application, including the school he seeks to enter, and shall set forth the time and place for

the hearing. The proceedings shall be matured for hearing upon expiration of twenty-one days from the issuance of the notice to the Pupil Placement Board by the clerk of the court and heard and determined by the judge of such court, either in term or vacation.

§ 9. The findings of fact of the Pupil Placement Board shall be considered final, if supported by substantial evidence on the record.

§ 10. From the final order of the court an appeal may be taken by the aggrieved party or any interested party, as defined in §6, to the Supreme Court of Appeals as an appeal of right, in the same manner as appeals of right are taken from the State Corporation Commission.

§ 10a. An injunction proceeding may be brought in any State court of competent jurisdiction by the Commonwealth, or by any interested party as defined in §6, for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in evasion of, in disregard of, or at variance with, any of the foregoing provisions.

§ 11. Neither the Pupil Placement Board nor its agents shall be answerable to a charge of libel, slander or insulting words, whether criminal or civil, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made during the proceedings or deliberations.

APPENDIX V

Opinion of the Supreme Court of Appeals of Virginia in the DeFebio Case

PETITION FOR WRIT OF MANDAMUS

On January 19, 1957, Theo T. DeFebio and her two children, Theodore Thomas DeFebio, 14 years of age, and

Dominick Nicholas DeFebio, 9 years of age, became residents of Fairfax county, Virginia. Subsequently, on the request of the mother, her two sons were permitted by local school authorities to attend, on a temporary basis subject to being officially assigned by the Pupil Placement Board, public schools in Fairfax county. The older son was admitted to the Mount Vernon High School and the other son to the Hollin Hall Elementary School. Despite repeated requests made by the school authorities, Mrs. DeFebio refused to execute and file for her sons "application for placement of pupil" forms as required by Chapter 70, Acts of Assembly, Extra Session (1956), Code, Secs. 22-232.1, *et seq.* Because of this refusal permission for the two children to attend the named schools was withdrawn.

Thereafter, Mrs. DeFebio and her two sons filed in this Court a petition for a writ of mandamus praying that the County School Board of Fairfax County, the Division Superintendent of Schools of Fairfax County, the Principals of Mount Vernon High School and Hollin Hall Elementary School of Fairfax County, the President and members of the State Board of Education and the Superintendent of Public Instruction be compelled to reinstate the two children in the schools, notwithstanding Mrs. DeFebio's refusal to execute the application for placement of pupil.

Petitioners contend that Sec. 133 of the Virginia Constitution vests the power of enrollment or placement of pupils in public schools exclusively in local school boards, and that the legislature is thereby prohibited from vesting such power in the Pupil Placement Board or any other body.

The legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions. Sec-

tion 133 of the Virginia Constitution, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision.

Petitioners' second contention is that their rights under the Fourteenth Amendment to the Constitution of the United States are infringed by the requirement that the parent execute and file the application for placement of pupil forms. In support of this contention, they cite numerous federal cases on integration of public schools, including *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873, 38 A.L.R. 2d 1180, 349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 1083; *Atkins v. School Board of Newport News*, 148 F. Supp. 430, *aff'd*, 4 Cir., ____ F. 2d ____, *cert. den.*, ____ U. S. ____, ____ S. Ct. ____, ____ L. ed. ____.

None of these authorities is relevant to, or determinative of, the issue presented by the facts in this case. Petitioners are members of the Caucasian race, and the mother desires her children to attend schools in which only the members of that race are enrolled. The issue here is quite narrow. It involves no broad constitutional question of racial discrimination. The only issue presented is whether, as a prerequisite to the admission of her children to the public schools, Mrs. DeFelice may be required to execute an application in which the only information sought is (1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name

and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled.

There is nothing in such requirement that violates any of petitioners' constitutional or other legal rights. Indeed, the information sought could have been required by the school authorities without a specific act of the General Assembly. There is nothing in the record tending to show that the enforcement of the statute as to the petitioners will result in the children being denied admission to any school which they may be entitled to attend, or that they will thereby be required to attend any school to which they should not be admitted.

It is a fundamental principle of constitutional law, firmly supported by both Federal and State authorities, that a person who challenges the constitutionality of a state statute has the burden of proving that he himself has been injured or is threatened with injury by its enforcement. In other words, a person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality. It avails him nothing to point out that some other person might conceivably be discriminated against. "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227, 56 S. Ct. 754, 755, 80 L. ed. 1153; *Barrows* v. *Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586; *Morgan* v. *Commonwealth*, 168 Va. 731, 191 S. E. 791, 111 A.L.R. 62; *Grosso* v. *Commonwealth*, 177 Va. 830, 13 S. E. 2d 285; *Bailey* v. *Anderson*, 182 Va. 70, 27 S. E. 2d 914; *Avery* v. *Beale*, 195 Va. 690, 80 S. E. 2d 584; 11 Am. Jur., Constitutional Law, Sec. 111

et seq., p. 748 *et seq.*; 16 C.J.S., Constitutional Law, Sec. 76 *et seq.*, p. 226 *et seq.*

For the reasons stated the writ of mandamus must be denied.

Writ denied.